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No. 01-

IN THE

Supreme Court of the United States

JOSEPH A. LoCASCIO, III, M.D.,

Petitioner,

v.

HUNTINGTON EYE ASSOCIATES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether a state trial court violates the due process clause of the Fourteenth Amendment if it sends plaintiff's claims to the jury after granting defendant judgment as a matter of law on them at the end of plaintiff's case and defendant has no meaningful opportunity to present evidence and argument on those claims because he reasonably relied on that ruling and focused solely on his own counterclaims and third party claims at trial.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The circuit court's opinion (per Pancake, J.) granting petitioner's motion for judgment as a matter of law or in the alternative for new trial (Appendix ("Pet. App.") 1a-25a) is not otherwise published. The opinion of the Supreme Court of Appeals of West Virginia reversing that holding and remanding the case (Pet. App. 26a-43a) is published at 553 S.E.2d 773. The order of the Supreme Court of Appeals of West Virginia refusing petitioner's petition for rehearing (Pet. App. 44a) is otherwise unpublished.

STATEMENT OF JURISDICTION

The Supreme Court of Appeals of West Virginia entered its opinion and order on July 6, 2001 and denied rehearing on October 24, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF CASE

What happened at the trial of this matter in West Virginia circuit court violates principles at the heart of the concept of due process integral to our adversary judicial system and protected by the Fourteenth Amendment to the Constitution of the United States of America. After the circuit court granted judgment as a matter of law in his favor on claims against him, Petitioner Dr. Joseph A LoCascio, III (defendant below) ("Petitioner") reasonably relied on that ruling and tried the case as if only his counterclaims and third party claims were at issue. At the end of the trial, the circuit court sent to the jury both Petitioner's claims ***and*** those already decided in his favor as a matter of law. Although the court also allowed Petitioner to reopen his case and to introduce additional evidence, that offer came too late. Because Petitioner could not at that point undo what had transpired at trial, he was deprived of a meaningful opportunity to present a defense to the claims against him.

The dispute at issue arose when Petitioner decided not to buy into Huntington Eye Associates, Inc. (plaintiff below) ("HEA" or "Respondent"), the medical practice where he had worked for several years. Petitioner and HEA had previously agreed to terms relating to employment and the buy-in procedure in a contract that also contained a restrictive covenant purporting to prohibit Petitioner from practicing medicine in a particular geographic area in the event that he did not buy in to HEA. Upon learning of what he considered to be medicare fraud on the part of HEA's owner, Dr. Tully S. Roisman, M.D. ("Roisman"), Petitioner decided to leave HEA and then set up his own solo practice within the area purportedly covered by the covenant not to compete.

In response, HEA sued Petitioner, alleging breach of contract and tortious interference with business relationships. *See* Pet. App. 10a. HEA based its contract claims on both Petitioner's failure to buy in to the practice and his alleged violation of the restrictive covenant. *Id.* Petitioner in turn asserted counterclaims against HEA for breach of contract, constructive discharge, and restraint of trade and third party claims against Roisman for tortious interference and indemnification. Tr., pp. 23-24. Petitioner also argued that he was released from any contractual obligations by Roisman's fraudulent and unethical conduct. *See* Pet. App. 10a.

At trial, Respondent HEA supported its claims with testimony from only Dr. Roisman and a damages expert. *See* Tr., pp. 59ff. & 166ff. When Respondent rested its case in chief, Tr., p. 189, Petitioner moved for judgment as a matter of law[1] on the claims against him. Tr., pp. 192-93. Although the circuit court initially denied Petitioner's motion, Tr., p. 206, the Judge announced to the parties the next morning that he had changed his mind and decided to grant Petitioner judgment as a matter of law. Tr., p. 218. The circuit court concluded as a matter of law that: (1) the geographical reach of the covenant not to compete was so broad as to be unenforceable; (2) the contractual requirement that Petitioner buy into HEA was unenforceable because he had ceased to be part of the practice; and (3) the liquidated damages provision constituted an unenforceable penalty. Pet. App., 11a. Upon learning of the court's decision, Respondent's counsel asked to either have Petitioner proceed on his claims or have them dismissed with prejudice. Tr., p. 219.

1. Although the parties and the circuit court used the term "directed verdict" at trial, this Petition refers to "judgment as a matter of law," the term used in *W. Va. R. Civ. P.* Rule 50.

Before the Judge resolved that issue, Respondent's counsel moved to reopen Respondent's case in chief in order to put Petitioner on the stand in order to "flush out these issues which, apparently, are relevant to the Court," on the grounds that such testimony was necessary for a complete record on which the judgment as a matter of law could be reviewed on appeal. Tr., pp. 225-27. The circuit court allowed Respondent to reopen his case and examine Petitioner in front of the jury. Tr., pp. 230-31 & 233.

After Respondent's counsel examined Petitioner concerning issues related to Respondent's claims, Tr., pp. 235-64, Petitioner's counsel chose to ask only limited questions on cross-examination. Tr., pp. 264-68. On re-direct, Respondent's counsel was allowed — over objection by Petitioner's counsel — to explore issues relating to Petitioner's counterclaims. Tr., pp. 268-73. Nevertheless, Petitioner's testimony did not alter the circuit court's decision to grant judgment as a matter of law, which the Court believed it should state on the record in front of the jury. Tr., p. 274.

Respondent's counsel argued that the case should proceed to the jury on Petitioner's claims alone and wait until after the jury returned their verdict to inform them of its decision on Respondent's claims. Tr., p. 276. Petitioner's counsel opined that the Court had the authority to explain its decision for the jury and asserted that, while Petitioner was willing to go forward with his claims, it would be preferable to stay those claims and allow Respondent to appeal so that, if the judgment as a matter of law were reversed, the case could be considered in its entirety instead of piecemeal. Tr., p. 278. The circuit court decided to go ahead and try Petitioner's claims, noting that, "[i]t will just make it a shorter

trial, . . . and as far as the jury's concerned, all they know is that plaintiff has rested and we're going to go forward." Tr., p. 279.

When the trial resumed that afternoon, the Court explained to the jury that the trial would proceed with Petitioner's claims against Respondent and Roisman. Tr., p. 281. The remainder of the second day of trial consisted of Petitioner putting on his case in chief on his counterclaims against Respondent and third-party claims against Roisman. Tr., pp. 281-409. Petitioner did not take the stand during the presentation of his case but instead offered testimony from technicians and a doctor who had formerly worked for Respondent and from a medicare expert. *Id.*

On the third day of trial, Respondent opened its defense to Petitioner's claims by recalling Petitioner to the stand. Tr., p. 414. Petitioner's counsel chose not to conduct a cross examination of him. Tr., p. 439.

On the morning of the fourth day of trial, Respondent rested on his defense to Petitioner's claims and made a general motion for judgment as a matter of law. Tr., pp. 569 & 571. Respondent's counsel also asked the circuit court to "revisit its earlier decision . . . on the issue of the submission of the case to the jury" on the grounds that the entire case was tried. Tr., p. 572. Petitioner's counsel objected, repeatedly explaining that sending Respondent's claims to the jury would prejudice Petitioner because his presentation of evidence — specifically including what and how much to ask witnesses — had been based on the understanding that Respondent's claims had already been decided. Tr., pp. 574-75, 577, & 582-83. He argued that, "A defense has never been put on [because t]he case has never been postured in such a way for a defense to be put on." Tr., p. 583.

Respondent's counsel merely argued that a defense to Respondent's claims amounts to the same thing as what Petitioner would have to prove to prevail on his claims. Tr., pp. 578 & 583.

The circuit court decided to delay granting judgment as a matter of law for either side and to submit the entire case to the jury. Tr., p. 586. Almost immediately, however, the Judge also made clear that he would grant Petitioner judgment as a matter of law on Respondent's claims against Petitioner if the jury were to find for the Respondent. *Id.*

Petitioner's counsel objected that sending Respondent's claims to the jury would transform what the circuit court had considered at the end of Respondent's case in chief to be a pure question of law into a mixed question of law and fact. Tr., p. 587. He noted that, on the basis of the circuit court's granting judgment as a matter of law, Petitioner had not testified to, among other things, issues related to damages on Respondent's claims, including the number of HEA patients Petitioner saw and the fee income generated from such patients. Tr., pp. 589-90. More importantly, Petitioner's counsel explained the prejudicial effect of sending all the claims to the jury when the entire manner in which Petitioner presented his case was based on the Court's granting him judgment as a matter of law on Respondent's claims. Tr., pp. 596-98. As Petitioner's counsel noted, if not for the circuit court's ruling on Petitioner's motion for judgment as a matter of law, he — not Respondent's counsel — would have been eliciting testimony from Petitioner, and "sometimes it's not what you ask, it's also the manner and how the jury heard it." Tr., p. 598.

In an attempt to rectify this prejudicial effect, the circuit court permitted Petitioner to reopen his case and call any witnesses he wanted for rebuttal or any other purpose. Tr., pp. 598 & 601. After weighing the likely cost of such an approach against its potential benefits, Petitioner's counsel opted to rest without putting on additional witnesses, relying instead on the circuit court's representation that it would grant judgment as a matter of law in favor of Petitioner if the jury returned a verdict in favor of Respondent on its claims. Tr., pp. 598 & 601.

The jury returned a verdict in favor of Respondent and Roisman on all claims and awarded Respondent $650,000 on its claims. Tr., pp. 736-37. Subsequently, the circuit court entered an Order granting Petitioner judgment as a matter of law and, in the alternative, awarding him a new trial on Respondent's claims against him. Pet. App. 26a-27a. The circuit court based its grant of a new trial on the recognition that sending Respondent's claims to the jury after having initially announced its intention to grant judgment as a matter of law against Respondent deprived Petitioner of "his constitutional right to adequately and completely defend himself." Pet. App. 42a-43a. Thus, the circuit court recognized and remedied the deprivation of Petitioner's due process rights caused by its decisions during the trial.

On Respondent's appeal from that decision, the Supreme Court of Appeals of West Virginia implicitly rejected the circuit court's holding that its actions had deprived Petitioner of a constitutional right, concluding instead that Petitioner had a "fair opportunity to put on all of the evidence and argument that he wished in both defense and offense." Pet. App. 24a. The Supreme Court of Appeals of West

Virginia reversed the circuit court's order and reinstated the jury verdict that resulted from the lack of due process afforded Petitioner at trial. Pet. App. 25a.

In his petition for rehearing before the state Supreme Court, Petitioner argued in part that the circuit court's grant of a new trial was justified by the fact that it had deprived him of due process rights guaranteed by Art. III § 10 of the Constitution of West Virginia and the Fourteenth Amendment to the Constitution of the United States of America by sending the Respondent's claims to the jury after first announcing its decision to grant judgment as a matter of law on those claims and then allowing the trial to proceed as if those claims had been decided. Petition for Rehearing. p. 9 & n.1. The Supreme Court of Appeals of West Virginia denied that petition without comment.

This petition for a writ of certiorari followed.

As a general rule, this Court only reviews state court judgments under 28 U.S.C. § 1257 if petitioner's federal claim "was either addressed by, or properly presented to, the state court" in question. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029 (1997). A claim is regarded as having been adequately presented "[i]f the record as a whole shows either expressly or by clear intendment that" it was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 63 (1928).

Although presentation on a petition for rehearing does not usually suffice, *see Adams*, 520 U.S. at 89 n.2, 117 S. Ct. at 1030 n.2, it may be sufficient where, as in West Virginia, the state appellate rule concerning petitions for rehearing does

not prohibit new issues to be raised at that stage. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-65, 102 S. Ct. 2421, 2426-28 (1982) (accepting certiorari jurisdiction of claims raised, but not passed upon, in Mississippi Supreme Court petition for rehearing); *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 77, 108 S. Ct. 1645, 1650 (1988) (citing *Hathorn* and suggesting that Court can consider issue properly based on petition for rehearing); *Lemley v. Barr*, 343 S.E.2d 101 (W.Va.1986) (granting petition for rehearing asserting that the Supreme Court of Appeals of West Virginia had not heard arguments about or adequately considered the question of the best interest of the child in connection with decision on initial hearing to give full faith and credit to Ohio adoption custody decision); *W.Va. Rule App. Procedure* 24 (". . . The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended and shall contain such argument in support of the petitioner as the petitioner desires to present.").

Indeed, this Court has decided federal due process claims first raised at that stage under circumstances similar to those in this case. *See Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S. Ct. 1761 (1996). In *Richards*, petitioners had challenged county occupational taxes on state and federal constitutional grounds. *Id.*, at 794-95, 1764. When the County moved for summary judgment on all claims on the grounds that they were barred by a prior adjudication of the tax, the trial court granted the motion only with respect to the state claims, holding that the federal claims had not been decided in the earlier case. *Id.*, at 795, 1764. On appeal, the County argued that the previous litigation also barred the federal claims and the Alabama Supreme Court agreed, explaining that *res judicata* applies both to matters litigated and matters that could have been but were not raised and litigated. *Id.*, at 795-96, 1764-65.

Although petitioners had not raised the issue in the state appeal, this Court considered the due process challenge to the Alabama Supreme Court's application of *res judicata*, holding the issue preserved for review "[b]ecause petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court." *Id.*, at 797 n. 3, 1761 n.3. Thus, this Court declined to penalize petitioners where, as here, they won before the trial court and did not raise the claim in question in their defense of the state appeal, despite knowing that the state Supreme Court's decision might implicate a federal constitutional issue. Under the unanimous holding in *Richards*, it is sufficient that such a petitioner raises the federal constitutional claim in a request for rehearing by the state court — ***after*** the court actually rules in a way that gives rise to the constitutional infirmity in question.

In addition, this Court is empowered to consider a due process issue "[w]here, as here, a possible due process violation is apparent on the particular facts of a case." *Wood v. Georgia*, 450 U.S. 261, 264-65, 101 S. Ct. 1097, 1100 (1981) (remanding case on due process grounds); *see Vachon v. New Hampshire*, 414 U.S. 478, 480, 94 S. Ct. 664, 665 (1974) (per curiam) (reversing conviction "based on a record lacking any relevant evidence as to a crucial element of the offense charged" because it violates due process, despite defendant's failure to raise due process issue).

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision of the Supreme Court of Appeals of West Virginia effects a profound deprivation of fundamental due process rights

guaranteed to the citizens of West Virginia by the Fourteenth Amendment to the Constitution of the United States of America. Indeed, that decision rejected the state circuit court's attempt to remedy the glaring lack of fairness that resulted from its sending claims to the jury after it had effectively prevented Petitioner from offering a defense to them.

At a minimum, due process should guarantee that litigants facing the loss of life, liberty, or property in a state trial court may reasonably rely on that court's rulings defining the issues to be adjudicated when they decide how to present their evidence. The issues to be decided should not be changed after the issues originally identified have already been tried, when the litigants no longer have a meaningful opportunity to address the new issues. Failure to rectify the state Supreme Court's reinstatement of the jury verdict based on this clearly unconstitutional procedure would effectively sanction its disregard for long-held principles at the core of our concepts of due process and the adversary judicial system.

I. The Decision Below Deprived Petitioner of Fundamental Due Process Rights Guaranteed by the Fourteenth Amendment.

A. The due process clause of the Fourteenth Amendment guarantees a party facing the loss of property at the hands of state courts the right to a meaningful opportunity to present evidence to respond to the claims against him.

"Common justice requires that no man shall be condemned in his person or property without notice and an

opportunity to make his defence." *Baldwin v. Hale*, 68 U.S. 223, 233 (1864). This Court has long recognized that

> [i]t is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered.

Galpin v. Page, 85 U.S. 350, 368 (1873). Indeed, one's right to defend when "assailed in his person or in his property" is a principle of "natural justice" lying "at the foundation of all well-ordered systems of jurisprudence." *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

In the United States, this principle is manifest in the due process clause, which requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950). "[T]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914). That opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). The "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314, 70 S. Ct. at 657.

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172, 71 S. Ct. 624, 644 (1951) (J. Frankfurter, concurring). In order for this approach to work, the party facing a loss must be able "to 'mold' his argument to respond to the precise issues which the decisionmaker regards as crucial." *Mathews v. Eldridge*, 424 U.S. 319, 345-46, 96 S. Ct. 893, 908 (1976). "A party is entitled . . . to know the issues on which a decision will turn and to be apprised of the factual material on which the [decision maker] . . . relies for decision so that he may rebut it." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 443 n.4 (1974). This is why "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S. Ct. 1723, 1732 (1991) (footnote omitted).

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence." *In re Oliver*, 333 U.S., 257, 273, 68 S. Ct. 499, 507 (1948). That "system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 450 (1981). If a party is not afforded proper notice and a meaningful opportunity to respond to the claims against him, "the Court is denied the benefit of the adversary process." *Lankford*, 500 U.S. at 127, 111 S. Ct. at 1733.

Due process is denied where, as here, the adversary process malfunctions and a party is not afforded a meaningful

opportunity to respond to his opponent's claims. *Lankford*, 500 U.S. at 127, 111 S. Ct. at 1733 ("Petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case."); *Georgia Ry. & Electric Co. v. Decatur*, 295 U.S. 165, 171, 55 S. Ct. 701, 703 (1935) (stating that "competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution") (citations omitted); *Saunders v. Shaw*, 244 U.S. 317, 319, 37 S. Ct. 638, 639 (1917) (finding denial of due process where state Supreme Court decided case in way that precluded intervening defendant from presenting his evidence, noting that the Court "cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in").

B. The circuit court's decision near the end of trial to send to the jury claims on which it had previously granted Petitioner judgment as a matter of law deprived Petitioner of a meaningful opportunity to present evidence to respond to the claims against him.

By changing the issues to be adjudicated after the trial was essentially over, the circuit court prevented Petitioner from responding in any meaningful way to the claims against him just as effectively as if it had actually prohibited him from offering any evidence at all on the issue. Although the court permitted Petitioner to reopen his case and offer

additional witnesses and evidence, that opportunity was, as a practical matter, worthless.

In holding that Petitioner had a "fair opportunity to put on all of the evidence and argument that he wished," the Supreme Court of Appeals of West Virginia improperly focused on the limited question of whether Petitioner had the opportunity ***at some point during the trial*** to put on all of his evidence. The Supreme Court ignored what Petitioner's counsel argued at trial and what the circuit court recognized in its Order granting a new trial: at least as important as ***what*** evidence the parties present is ***how*** they are able to present it. Proper due process analysis considers of the nature of a party's opportunity to respond to claims against it. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965) (requiring that the opportunity to be heard "be granted at a meaningful time and in a meaningful manner").

In order for the chance to respond to be "meaningful," a party must be given accurate notice of the claims in question so that he can address the relevant issues. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4, 95 S. Ct. 438, 443 n.4 (1974) (holding that party is entitled to know both the issues on which the decision will turn and the factual material on which the decision maker will rely so that he can rebut); *see Mathews v. Eldridge*, 424 U.S. 319, 345-46, 96 S. Ct. 893, 908 (1976) (recognizing importance of party's being able "to 'mold' his argument to respond to the precise issues which the decisionmaker regards as crucial"). In this case, the circuit court notified the parties at the end of Respondent's case in chief that it was granting judgment as a matter of law on Respondent's claims. Tr. 218 & 274. After Petitioner reasonably relied on that notice during trial,

the circuit court rendered it absolutely inaccurate and worthless by changing its mind and sending Respondent's claims to the jury instead. As a result, Petitioner received no notice of and no real opportunity to respond to the claims against him.

The circuit court's May 2, 2001 Order recognizes the way in which its decisions during trial fatally undercut Petitioner's ability to put on his case. The Order expressly bases the granting of a new trial on Respondent's claims on the fact that the circuit court's actions deprived Petitioner of his constitutional right to put on a complete and adequate defense. Pet. App. 42a-43a. More particularly, the circuit court recognized that it should not have sent the Respondent's claims to the jury after having initially announced that it would grant Petitioner's motion for judgment as a matter of law and then directing Petitioner to put on his claims. *Id.* Simply put, the circuit court belatedly realized that it had improperly changed the rules on Petitioner and that the effects of that change were so profound that nothing it could have done at trial would have undone the unfairness or made Petitioner's opportunity to respond more than an empty gesture.

The nature and extent of the adverse impact on Petitioner is easy to understand. Almost immediately after the circuit court announced to the parties its decision to grant Petitioner judgment as a matter of law on Respondent's claims, it allowed Respondent to reopen its case in chief and examine Petitioner so that the record would be complete on appeal. Tr., pp. 225-233. This request would clearly not have been made — and Respondent's counsel would not have had the opportunity to dictate the nature of Petitioner's initial testimony — but for the circuit court's ruling on Petitioner's

motion for judgment as a matter of law. After the court confirmed that the testimony from Petitioner had not altered that decision, there was no reason for Petitioner to mount a defense to Respondent's claims, much less to take the stand to testify in support of that defense.

Petitioner's situation at that point is similar to that of the intervening defendant in *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917). In *Saunders*, plaintiff sought to avoid the collection of a drainage tax by presenting evidence that their property would not be benefitted by the drainage system being built. *Id.*, at 318, 639. The defendant objected and that evidence was excluded as inadmissible, although both plaintiff and defendant put evidence on this issue on the record "in order to carry the case to the supreme court." *Id.* After judgment was entered for defendant and intervening defendant and affirmed by the state Supreme Court, a rehearing was granted in which that Court reversed the judgment based on a decision handed down after the trial court judgment. *Id.*, at 319, 639. When his application for a second rehearing was denied due to a rule allowing only one rehearing, the intervening defendant argued that he had been deprived of due process of law because he had not been given an opportunity to present his evidence on this issue. This Court agreed, noting that

> [t]echnically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.

Saunders v. Shaw, 244 U.S. at 319, 37 S. Ct. at 639. Similarly, Petitioner was not bound to respond to Respondent's claims against him after the circuit court had already decided them in his favor.

Nor did it make sense for him to retake the stand to say more in support of his own claims, given the likelihood of doing so would suggest to the jury that he did not stand by his original testimony. *See* Tr., pp. 268-73. Based on his understanding that the jury would consider ***only*** his claims against Respondent and Roisman, Petitioner instead chose to support those claims with testimony from former Respondent technicians, a doctor who had left Respondent, and his medicare expert. *See* Tr., pp. 281-409.

Neither the fact that Petitioner's testimony was primarily elicited by Respondent's counsel nor his reliance on the granting of judgment as a matter of law would have deprived him of due process with respect to Respondent's claims if the circuit court had not sent those claims to the jury along with those of Petitioner. Indeed, without a jury verdict on the Respondent claims, even if the state Supreme Court had accepted an appeal of the judgment as a matter of law and reversed, Petitioner would have gotten exactly what he is now seeking: a new trial. The circuit court's decision to send the jury claims it had already deemed legally insufficient negated the understanding on which Petitioner had based his presentation of evidence at trial and made that presentation worse than useless. As the circuit court recognized in its May 2, 2001 Order, the damage had already been done and no amount of additional evidence from Petitioner could undo it at that point.

Petitioner's inability to meaningfully respond to Respondent's claims that late in the trial resulted in part from the fact that any attempt to tack on additional evidence addressing them would merely serve to compound the jury's confusion concerning the relationship between the issues to be decided and the way the evidence was presented by the parties.

From the jury's perspective, the trial opened with the Court's explaining that the case involved both Respondent's claims against Petitioner and his claims against Respondent and Roisman. Tr., pp. 23-24. Although they were ultimately asked to return a verdict on all of those claims, the jury had to do so on the basis of only Respondent's presentation of its case, Petitioner's presentation of his case, and the defense of Respondent and Roisman in response to Petitioner's case. Conspicuously absent was Petitioner's defense in response to Respondent's claims. Since the Court explained after Respondent rested its case in chief that the trial would proceed with Petitioner's ***claims***, *see* Tr., p. 281, the jury could easily have wondered why Petitioner never offered a ***defense*** to Respondent's claims. Regardless of whether "all" of Petitioner's evidence was somehow presented, it is difficult to imagine how this lack of a formal defense to Respondent's claims — denominated as such — did not confuse the jury or prejudice Petitioner. The fact that the Court had allowed Respondent to reopen its case after initially resting doubtless compounded the confusion. *See* Tr., p. 233.

In addition to confusing the jury, the circuit court's management of the trial prevented Petitioner from putting on certain evidence that he would otherwise have presented to them. Based on the understanding that the Court had

already decided Respondent's claims in his favor, Petitioner did not present evidence challenging Respondent's damages claims, including testimony concerning the number of Respondent patients Petitioner saw and the fee income generated from such patients. *See* Tr., pp. 589-90. Although in theory Petitioner might have taken the stand to add his testimony on these points, doing so entirely out of order and at the very end of trial would almost certainly have appeared to the jury as a capitulation on the issue of liability, especially given the fact that he had not even presented a defense to Respondent's claims.

It was completely unfair for Petitioner to have been forced into deciding whether to take the stand in the eleventh hour in a futile attempt to present testimony relating to Respondent's claims when the parties had understood all along that those claims had already been decided by the Court. The due process clause of the Fourteenth Amendment requires that litigants be given a more meaningful opportunity to respond to the claims against them. The circuit court recognized this in its Order and concluded that the same inherent unfairness had deprived Petitioner of any meaningful opportunity to frame his case in a manner that actually addressed all of the issues that were ultimately considered by the jury.

In *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917), this Court explained there was no way to "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.*, at 319, 639-40. Petitioner respectfully submits that he deserves the same meaningful chance to introduce evidence — as part of his overall presentation rather than as an afterthought. Only a new trial will afford him that opportunity.

CONCLUSION

For the foregoing reasons, Petitioner Joseph A. LoCascio, III, M.D., prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DATED AND DECIDED JULY 6, 2001

SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 28889

HUNTINGTON EYE ASSOCIATES, INC.,

Plaintiff below, Appellant,

v.

JOSEPH A. LoCASCIO, III, M.D.,

Defendant below, Appellee.

Submitted June 12, 2001

Decided July 6, 2001

* * *

PER CURIAM.

This is an appeal of an order of the Circuit Court of Cabell County that in essence set aside a plaintiff's verdict and directed a verdict in favor of the defendant. The court also, in the alternative, awarded the defendant a new trial.

Appendix A

I.

The appellant and plaintiff below is Huntington Eye Associates, Inc. ("HEA"), a corporation that is solely owned by Dr. Tully Roisman, M.D., an ophthalmologist. The appellee and defendant below is Dr. Joseph A. LoCascio, III, M.D., also an ophthalmologist.

Dr. Roisman created HEA as a business structure for the ophthalmology practice that Dr. Roisman began in Huntington, West Virginia in 1983.[1] Dr. Roisman wished to build HEA into a regional, multi-physician, multi-specialist ophthalmology practice. In the course of developing HEA, Dr. Roisman invested substantial amounts of his personal monies, brought the first laser to ophthalmology practice in Huntington, recruited sub-specialists in corneal and retinal work, and founded treatment programs for diabetics. Dr. Roisman also developed a network of consultation and referral involving optometrists and other physicians in a wide geographic area around HEA's principal office in Huntington, West Virginia.[2]

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1. In connection with the matters that are at issue in the instant case, the activity and conduct of Dr. Roisman was also the activity and conduct of the corporate entity that Dr. Roisman owns — that is, of HEA. In this opinion we will therefore often refer to Dr. Roisman with the understanding that HEA is included in that reference.

2. At the time Dr. LoCascio came to work for HEA in 1990, HEA also owned and operated a branch office in Portsmouth, Ohio. Apparently the Portsmouth, Ohio office closed shortly after Dr. LoCascio left HEA in 1994, and another branch office was opened in Ashland, Kentucky. Additionally, after Dr. LoCascio joined HEA,

(Cont'd)

Appendix A

Dr. Roisman met Dr. LoCascio, who was then living in New York State, in 1989, at a "placement exchange" held in connection with a medical professional gathering. Dr. Roisman was a fully trained, certified, and experienced cornea and cataract specialist. After practicing in several other geographic areas, Dr. LoCascio wished to relocate and to join a multi-physician practice that drew from a large geographic area. He had no contacts or prior experience in the Huntington area.

Dr. Roisman and Dr. LoCascio engaged in substantial negotiations about the terms of Dr. LoCascio's joining HEA, and Dr. LoCascio was represented by experienced legal counsel. Dr. LoCascio was no stranger to medical employment contracts, having been in litigation with his previous employer about such a contract.

The contract that was ultimately agreed upon by Dr. Roisman and Dr. LoCascio provided that Dr. LoCascio would be employed by HEA for an initial 1-year term at a salary of $175,000, at the end of which period Dr. LoCascio would make a decision to either stay and join the practice, or to depart. If Dr. LoCascio chose to stay with HEA, the contract provided that Dr. LoCascio would remain an HEA employee for 3 more years, at increasing salary levels: $225,000 the

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(Cont'd)
HEA staff began working part-time at three other HEA "branch offices" (as Dr. Roisman referred to them at trial) — in Williamson, West Virginia; Ironton, Ohio; and Teays Valley, West Virginia. However, these facilities were owned and operated by non-HEA physicians; HEA staff went to these offices several times a month to provide specialist services to patients.

second year, $275,000 the third year, and $325,000 the fourth year. At the end of 4 years, the contract called for Dr. LoCascio to buy an equal ownership share of HEA stock. The size of that share would depend on how many doctors at that time were stockholders in HEA or were employees with an option to buy a share, when their ability to do so accrued pursuant to their contract.

In addition to his salary, Dr. LoCascio also received from HEA full medical insurance benefits, professional liability insurance, licensing and education costs, and the use of a leased car. The contract provided that if LoCascio left the HEA practice, he would not perform vision services within 50 miles of any HEA office for a period of 2 years post-departure. Specifically, the contract said:

> 19. RESTRICTIONS: HEA will provide Physician [Dr. LoCascio] with complete access to its books, records, patient lists and dates, as well as its professional methods, procedures, contracts, knowledge and experience, to an extent which HEA would not provide Physician except in contemplation of this Agreement. **Physician has represented to HEA and its officers that he does not intend or desire to remain or practice medicine within the area professionally served by HEA, if in fact he does not remain employed by HEA and if he does not purchase such equity stock interest in HEA, as herein contemplated.** Therefore, in consideration of the covenants and agreement on the part of HEA as set forth in this Agreement, both for employment

> and for the sale of said stock, **Physician does covenant and agree with HEA that in the event his employment with HEA shall be terminated for any reason whatsoever, then and in such event Physician agrees that he will not engage in the practice of ophthalmic medicine, for a period of at least two (2) years after leaving the employment of HEA, within a radius of fifty (50) miles of the city limits of Huntington, West Virginia or of any HEA branch office. Physician acknowledges that in the event he breaches such agreement herein made on his part, then HEA will suffer damage by virtue of the premises and such breach, and the parties do hereby agree that the amount of such damage in such event would be a sum equal to two (2) years' total compensation at the rate provided for Physician in this Agreement, and in effect at the time of such breach.** Similar restrictions will be applied to all physicians, stockholder and non-stockholder, of HEA.

(Emphasis added.)

Dr. LoCascio worked for HEA for the 1-year "trial period." He had a full patient load from the first day, and he participated fully in the HEA practice, coming to know the local medical market and community. At the end of his first year, Dr. LoCascio elected to remain at HEA, and to "buy in" and become one of the owners of HEA in 3 years. Dr. LoCascio was paid the increasing salary and benefits that were specified in his contract for the next 3 years. Dr.

LoCascio's billings generated gross revenues for HEA that were substantially in excess of his salary; however, HEA covered all of the overhead of his practice.

In early to mid-1994, Dr. LoCascio began to look for other employment. He traveled to Seattle, Washington, and to other locations to explore other employment opportunities. Dr. LoCascio testified that his exploration of other possible employment resulted from his belief that he might not do well financially by buying into the HEA practice. According to Dr. LoCascio, one consideration was that two physicians who had come to HEA had left without joining the practice as owners — and with those physicians gone, Dr. LoCascio believed that buying into HEA might not be consistent with his financial goals. However, at the same time that Dr. LoCascio was exploring other employment alternatives, he was also negotiating with Dr. Roisman about possibly revising the contractual terms regarding the cost of a buy-in at HEA.

In October of 1994, Dr. LoCascio and Dr. Roisman participated in a meeting with several "technician" employees who worked in the HEA offices. These employees tested patients' vision, using eye charts, lenses, and similar equipment — to obtain visual acuity test result numerical readings, like $^{20}/_{20}$, $^{20}/_{30}$, etc. Some of the technician employees had received special certification in connection with this work; others had not, and it does not appear that such certification was legally required. Most had learned the testing procedures on the job.

The results of the technicians' visual testing were recorded by the technician on a patient's chart. The technician

would then leave the patient, who would wait for an HEA doctor, like Dr. Roisman or Dr. LoCascio — who would then examine the patient, having the technician's test results in hand. The interpretation of the test results, any additional testing or re-testing, and any medical diagnosis and prescription, were the sole responsibility of the physician.

At the October 1994 meeting, the technician employees complained that Dr. Roisman had in a number of instances superseded or invalidated the visual acuity test results that the technicians had written on a patient's chart — by crossing through (but ordinarily not obliterating) the technician's results, and substituting Dr. Roisman's own numbers on the patient's chart. According to the testimony of several technicians at the trial in the instant case, Dr. Roisman's revisions occurred in almost all instances where a patient in fact had cataracts, but where the technician's test result numbers were not severe enough to permit Medicare reimbursement for the patient's cataract surgery. The evidence was unrefuted at trial that such changes by Dr. Roisman occurred with some regularity — although clearly they were not the ordinary case.

At the meeting, Dr. Roisman did not give much shrift to the technicians' complaints. However, Dr. LoCascio said that he was very surprised by the complaints, and he testified that he pulled several hundred of Dr. Roisman's charts for review. Dr. LoCascio further testified that he found the complaints to be corroborated by the charts. Dr. LoCascio testified that he decided, on the basis of the meeting and his review of Dr. Roisman's charts, that he, Dr. LoCascio, would definitely not stay at HEA because of what Dr. LoCascio

believed to be seriously unethical and fraudulent conduct by Dr. Roisman.

There are, of course, two sides to the issue of the alleged misconduct by Dr. Roisman that Dr. LoCascio claimed both led to and legally justified his leaving HEA. It is appropriate at this juncture to skip ahead a bit and summarize the other evidence that developed on this issue — before continuing the narrative of the events that culminated in the lawsuit, trial, and court order that form the basis of the appeal that is before this Court in the instant case.

To complete Dr. LoCascio's side of the story: at trial Dr. LoCascio amplified on the complaints that the technicians had made about Dr. Roisman. Dr. LoCascio called as a witness a doctor who had left HEA and a physician expert on Medicare, who accused Dr. Roisman of dishonesty and fraud, and of doing unnecessary cataract surgery on patients who did not yet have sufficiently limiting impairments from their cataracts. Dr. LoCascio also put several former HEA employee technicians on the stand, who repeated their allegations about Dr. Roisman's changing test results, and who also accused Dr. Roisman of coaching patients about what lines on an eye chart that they should be unable to read, in order to qualify for Medicare reimbursement for cataract surgery. Dr. LoCascio's witnesses also alleged that Dr. Roisman did not obtain truly informed consent from some cataract surgery patients.

Dr. Roisman put forth a contrary position. Through his own testimony, that of former patients, and the opinion of a professional Medicare auditor, Dr. Roisman explained that

doctor re-testing and re-evaluation of visual acuity, especially under varying lighting that can affect a patient's degree of cataract impairment, is both common and well within the standard of professional care — and is not Medicare fraud nor the basis for a charge of unethical conduct. Dr. Roisman made the point that despite Dr. LoCascio's having given information about Dr. LoCascio's allegations of fraud by Dr. Roisman to the authorities, no civil or criminal action against HEA or Dr. Roisman had ever been taken, including the last 6 years while this lawsuit was pending — 1994 to 2000.

Dr. Roisman also denied any improper coaching of patients and rejected the accusation that he had performed any unnecessary surgery. Dr. Roisman described the accomplishments of his practice, and proudly admitted to being a strong advocate for his patients. He rejected the suggestion that the complaining technicians had the right or ability to elevate their judgment as to a patient's acuity or need for surgery above Dr. Roisman's professional judgment and his experienced diagnostic and prescriptive decision-making.

With regard to Dr. LoCascio's charges against Dr. Roisman, then, the evidence and the conclusions to be drawn therefrom were about as polarized as could be imagined, presenting classic jury questions. As the continuation of this narrative will show, the jury that was empaneled in this case accepted the position that Dr. Roisman advanced at trial.

To return to the chronological narrative of the development of this case: several months following the meeting with the technicians, in January of 1994, Dr.

LoCascio gave Dr. Roisman 2 weeks' notice that he, Dr. LoCascio, was leaving HEA. Dr. LoCascio also told Dr. Roisman that he was going to open his own ophthalmology practice in Huntington, approximately a mile and a half away from Dr. Roisman's main office. This news came as a complete surprise, according to Dr. Roisman.

Dr. Roisman thereafter sued Dr. LoCascio for breach of contract and tortious interference with business relations. Dr. Roisman sought damages in the amount of the contractually required stock purchase, or, in the alternative, the $650,000 (two times Dr. LoCascio's salary at the time of the alleged breach of contract) in liquidated damages that the contract called for in the event that Dr. LoCascio breached its terms. Dr. LoCascio counterclaimed against Dr. Roisman, asserting claims of tortious interference and constructive discharge. Dr. LoCascio claimed, *inter alia*, that Dr. Roisman had engaged in fraudulent and unethical conduct in connection with the HEA practice that excused any breach of contract by Dr. LoCascio.

The case proceeded to trial before a jury in January of 2000. Dr. Roisman, in his case-in-chief, described how he had founded and developed HEA, how he had recruited Dr. LoCascio, and how Dr. Roisman and Dr. LoCascio had negotiated Dr. LoCascio's contract of employment. Dr. Roisman explained that he had provided Dr. LoCascio with a "turn-key" practice, with a full complement of patients from his first day. Dr. Roisman testified that he had paid Dr. LoCascio a large salary (one million dollars), with full benefits, over 4 years. Dr. Roisman defended the 2-year non-compete clause as a mutually bargained-for protection for

HEA against the financial consequences of losing a key employee, and then having that employee "set up shop" in the same area. Dr. Roisman put on evidence that Dr. LoCascio, shortly before he left HEA, had taken a copy of the HEA patient list, to which Dr. LoCascio had access while he was at HEA. Dr. Roisman testified that Dr. LoCascio, in his post-HEA practice, had been obtaining a substantial number of patient referrals from sources who had previously been referring patients to Dr. LoCascio at HEA. Dr. Roisman presented the testimony of an economist who concluded that HEA had lost a substantial amount of former HEA patient income as a direct result of Dr. LoCascio's leaving HEA. The economist also concluded that Dr. Roisman had suffered monetary damages as a result of Dr. LoCascio's failure to purchase stock in HEA.

At the end of Dr. Roisman's case-in-chief, the circuit court decided that HEA's claim against Dr. LoCascio must fail as a matter of law for three basic reasons. The circuit court concluded that: (1) the geographic area of non-competition in Dr. LoCascio's contract was as a matter of law so over broad as to make the covenant not to compete unenforceable in any fashion; (2) the contractual requirement that Dr. LoCascio purchase stock in HEA was as a matter of law unenforceable because Dr. LoCascio had ceased to be a part of the HEA practice; and (3) the $650,000 liquidated damages provision was a penalty as a matter of law, and therefore was unenforceable.

However, the circuit court did not instruct the jury that the court was ruling against Dr. Roisman as a matter of law. Rather, in several related procedural rulings that we need

not detail here, the circuit court allowed the trial to proceed and go to the jury on the parties' claims and defenses, for the purpose of making a complete appellate record. Pursuant to these procedural rulings, after Dr. Roisman presented his case-in-chief, Dr. LoCascio presented evidence in support of his counter-claims against Dr. Roisman. Dr. Roisman then presented evidence in rebuttal. The circuit court then allowed Dr. LoCascio to put on any additional evidence that he wished, including recalling witnesses, in defense to Dr. Roisman's claims against Dr. LoCascio.

A lengthy instructions conference produced a charge to the jury on the parties' claims and counterclaims and defenses. Neither appellant nor appellee has raised before this Court any argument that this jury charge was legally deficient or inaccurate; and our general review of the charge indicates that the charge fairly sets forth the applicable law on the parties' claims and defenses, and gave the jury its proper role in ruling on those claims and defenses. We need not discuss these in detail.

The jury was furnished with a verdict form that the parties also have not criticized in their briefs. The positions of the parties were ably argued to the jury by counsel. The jury returned the following verdict:

Appendix A

JURY VERDICT FORM

1. We the jury find by a preponderance of the evidence that Joseph A. LoCascio, III, M.D. breached without justification the contract he had with Huntington Eye Associates, Inc.

Check one:

✓	
YES	NO

2. We the jury find by a preponderance of the evidence that Joseph A. LoCascio, III, M.D., tortiously interfered with the business of Huntington Eye Associates, Inc.

Check one:

✓	
YES	NO

If you have checked "YES" to any one or more of questions 1 or 2 above, give the amount of damages which you believe Huntington Eye Associates, Inc. should receive in compensation, if any. If you have checked "NO" to each question 1 and 2 above, then enter "-0-" and proceed directly to question 3 below.

$ 650,000

3. We the jury find by a preponderance of the evidence that Dr. Tully Roisman tortiously interfered with the contract by and between Huntington Eye Associates, Inc. and Dr. Joseph A. LoCascio, III, M.D.

Check one:

___	✓
YES	NO

4. We the jury find by a preponderance of the evidence that Huntington Eye Associates, Inc. constructively discharged Joseph A. LoCascio, III, M.D.

Check one:

___	✓
YES	NO

If you have checked "YES" to either question 3 or 4 above, and you believe that Joseph A. LoCascio, III, M.D. is entitled to compensation from Huntington Eye Associates, Inc., give the amount of damage you award, if any:

$___

After the jury returned its verdict, the circuit court entered an order dated May 2, 2000 from which the instant appeal is taken. That order directed a defense verdict for

Dr. LoCascio on Dr. Roisman's claims, on the grounds that Dr. Roisman's case had failed as a matter of law. This order, in essence, set aside the jury verdict in favor of Dr. Roisman. Also, the jury having ruled against Dr. LoCascio on his counterclaim against Dr. Roisman, the circuit court did not disturb that ruling.

The circuit court also, in the alternative, awarded a new trial to Dr. LoCascio on Dr. Roisman's claims against Dr. LoCascio, on the grounds that Dr. LoCascio had not had a fair and full opportunity to defend against Dr. Roisman's claims.

II.

We first consider whether the circuit court erred in ruling that Dr. Roisman's case failed as a matter of law. This was a purely legal ruling that we review *de novo.* Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

The circuit court's first ground for its ruling was that the geographic area of the foregoing-quoted non-competition clause in Dr. LoCascio's contract was as a matter of law geographically overbroad and thus unenforceable.

We need not go far afield to obtain the principles that govern the legal analysis of a covenant not to compete. In *Reddy v. Community Health Foundation of Man*, 298 S.E.2d 906, 171 W.Va. 368 (1982), former Justice Richard Neely authored a jurisprudential *tour de force* on this complex subject. The following syllabus points from the seminal opinion in *Reddy* direct our approach to the issues in the instant case:

Appendix A

2. An employee covenant not to compete is unreasonable on its face if its time or area limitations are excessively broad, or where the covenant appears designed to intimidate employees rather than to protect the employer's business, and a court should hold any such covenant void and unenforceable, and not undertake even a partial enforcement of it, bearing in mind, however, that a standard of "unreasonable on its face" is to be distinguished from the standard of "reasonableness" used in inquiries adopted by other authorities to address the minor instances of overbreadth to which restrictive covenants are naturally prone.

3. An inherently reasonable restrictive covenant is presumptively enforceable in its entirety upon a showing by the employer that he has interests requiring protection from the employee.

4. An employee may rebut the presumptive enforceability of a restrictive covenant by showing: (1) that he has no "trade assets" of the employer to convert; (2) that such "trade assets" as he has belong to him and not to the employer; (3) that the employer could be equally well protected by a narrowed covenant; or (4) that the employer has had time to recoup any extraordinary investment in the employee.

5. In an action for injunctive relief to enforce a restrictive covenant in an employment contract

> the burden of proving the inherent reasonableness of the restrictive covenant, and of showing a need for protection by it, is on the employer; the burden of proving that an inherently reasonable covenant should not be enforced in its entirety is on the employee.

In *Reddy*, this Court found that a covenant not to compete in a medical employment contract, with a 30-mile/3-year restriction, was not facially unreasonable as a matter of law. We remanded the case in *Reddy* for a factual determination as to whether the employer had proven a protectible interest that the covenant was reasonably designed to protect. We have stated that "[t]he existence of a[n employer's] protectible interest is a question of fact for a jury or trial court sitting as a fact finder." *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1983).

In a subsequent case, *Gant v. Hygeia Facilities Foundation, Inc.*, 181 W.Va. 805, 384 S.E.2d 842 (1989), we upheld a legal determination by a circuit court that a similar 30-mile/3-year covenant was not facially unreasonable. In *Gant* we also upheld the circuit court's factual determination that the employer had a protectible interest, and that the employee had not shown that the covenant should not be enforced in its entirety.

In the instant case, Dr. Roisman had begun and built a business that provided specialized eye care over a wide geographic area, and he recruited extensively for doctors who would like to join in building such a business. As definitively evidenced by the language of the contract that is at issue in

the instant case, Dr. Roisman specifically sought, in his recruiting efforts, doctors who would not abruptly leave HEA and go into direct competition with HEA in its market area.

The contract also definitively shows that Dr. LoCascio held himself out to be such a doctor. Dr. LoCascio specifically represented and promised to Dr. Roisman that Dr. LoCascio **"[did] not intend or desire to remain or practice medicine within the area professionally served by HEA**, if in fact [Dr. LoCascio did] not remain employed by HEA and if he [did not] purchase . . . equity stock interest in HEA[.]" (Emphasis added.) The contractual language and the other evidence at trial strongly suggest that Dr. Roisman would not have hired Dr. LoCascio, if Dr. LoCascio had not made such a promise.

Such a promise, of course, would mean little or nothing if it had no "teeth." Doctors, like lawyers and just about everyone else, understand that people's intentions and desires change. Therefore, to make it clear and to assure that he could be counted on to abide by and adhere to his stated intentions and desires, Dr. LoCascio also promised Dr. Roisman, in a solemnly binding fashion, that if Dr. LoCascio left HEA, Dr. LoCascio would abide by the specific non-compete provisions of the contract.[3] And Dr. LoCascio further promised to Dr. Roisman that Dr. LoCascio would pay specific and mutually-agreed-upon liquidated damages to Dr.

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3. "It is possible to imagine cases in which a worker is hopelessly overmatched in negotiations with his employer and is forced to sign a Draconian restrictive covenant, but those are not the facts of this case." *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 219, 314 S.E.2d 166, 175 (1983) (Neely, J., dissenting).

Roisman, if Dr. LoCascio failed to honor those non-compete provisions.

Dr. LoCascio did not testify that he did not understand or did not intend to keep the promises that he made to Dr. Roisman. Dr. LoCascio's explanation at trial for his breach of those promises was rather that the breach was entirely caused, excused, and justified by Dr. Roisman's alleged unethical, fraudulent conduct.

The circuit court's order holding that the non-compete clause in the instant case was unenforceable focused on the court's conclusion that the existence of the several HEA "branch offices" resulted in an "area limitation [that is] excessively broad," Syllabus Point 1, *Reddy, supra* — by the circuit court's estimate, as much as 120 miles in one dimension.

However, Dr. Roisman put on evidence that HEA drew significant numbers of patients from a wide area around the various HEA "branch offices."[4] The theoretical breadth of

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4. Justice Neely identified in *Reddy* the sort of protectible interests that employers may have that will justify an at least facially enforceable covenant not to compete:

> The situations most likely to give rise to such an injury are those where the employer stands to lose his investment in employee training, have his trade secrets or customer lists converted by the employee, *or have his market share threatened by the employee's risk-free entry into the employer's market.* These examples are not intended, however, as an exhaustive list; the central

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the contractually proscribed area, while a possible factor for a jury to consider in determining HEA's protectible interest, was not so broad as to be facially unreasonable — particularly in light of the fact that Dr. LoCascio, without first seeking any legal determination of his rights,[5] opened his competing office, not 51 miles from HEA's Huntington office, but less than 2 miles away.

We believe, consistent with this Court's approach in *Reddy* and *Gant*, that the circuit court erred in concluding that the non-compete provision of the commercial contract between these two sophisticated, well-represented professionals was facially overbroad and unenforceable as a matter of law.

The circuit court's second ground for directing a verdict against Dr. Roisman was based on the court's reasoning that the contract contemplated that Dr. LoCascio would purchase stock in HEA only if he was practicing there — so that when

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(Cont'd)

> inquiry must always be the extent to which the employee may unjustly enrich himself by appropriating an asset of the employer for which the employee has not paid and using it against that very employer.

171 W.Va. at 378-379, 298 S.E.2d at 916 (emphasis added). Dr. Roisman testified that Dr. LoCascio obtained market share in part as a result of the contacts that Dr. LoCascio made while at HEA.

5. "A declaratory judgment action is a proper way for a restricted employee to test the enforceability of a noncompetition covenant in his or her employment contract." *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 214, 314 S.E.2d 166, 170 (1983).

Dr. LoCascio left HEA, for whatever reason, Dr. Roisman could make no claim for damages against Dr. LoCascio based on Dr. LoCascio's failure to purchase stock. The circuit court concluded that changing circumstances at HEA, such as the departure of two other doctors, and ambiguities in the contract about the stock price made the stock purchase and related provisions unenforceable as a matter of law.

We agree that the stock purchase agreement contemplated that Dr. LoCascio would be practicing at HEA when he bought the stock. It is also correct that there were changes at HEA that would have justified modifying the "buy-in" terms, if Dr. LoCascio had in fact chosen to stay. Dr. Roisman testified that he had offered such modifications to Dr. LoCascio, and the evidence was that such modifications were being discussed, before the meetings with the technicians.

However, the analysis of the stock purchase agreement by the circuit court ignores the related matter of the liquidated damages provision of the contract, which the circuit court separately found to be an unenforceable penalty. When the stock purchase and liquidated damages provisions are considered together, it is apparent that both Dr. Roisman and Dr. LoCascio understood from the outset that Dr. LoCascio might change his "intentions and desires," and choose to leave HEA without purchasing stock in HEA — and indeed, that Dr. LoCascio might also choose to go so far as not to honor the non-compete provisions of the contract.

In such an event, the contractual language shows that Dr. Roisman and Dr. LoCascio understood that calculating the actual damages to HEA would be difficult, if not

impossible. Considering the inherent complexity and uncertainty of such a calculation, this was an entirely reasonable understanding. Therefore, *both* Dr. Roisman *and* Dr. LoCascio agreed (and the point bears emphasis that both had something at stake in coming to this agreement, for the actual loss could well be greater or less) on a "two-years'-salary" figure, as a rough but fair estimate of what the loss to HEA would be.

Our black-letter rule on liquidated damages provisions was stated in another "covenant-not-to-compete" case, *Wheeling Clinic v. Van Pelt*, 192 W.Va. 620, 453 S.E.2d 603 (1994):

> 3. "Parties may properly contract for liquidated damages (1) where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances of the case; or (2) where from the nature of the case and tenor of the agreement, it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties."
>
> 4. "A clause for damages in a contract is a penalty rather than a liquidated damage provision when the amount is grossly disproportional in comparison to the damages actually incurred. This is true even though the provision is denominated as liquidated damages in the contract."

Id., Syllabus Points 3 and 4 (citations omitted).

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The circuit court found that while the 2-years'-salary liquidated damages clause set HEA's damages at $650,000, HEA's actual damages were less than half of that amount, according to HEA's expert — and therefore that the liquidated damages amount was "grossly disproportionate" to the actual damages to HEA.

However, this finding was based on a mischaracterization of the expert's testimony. HEA's expert testified that the lost income from patients who had been with HEA and who had gone to Dr. LoCascio after he left HEA accounted for a nearly $300,000 direct loss to HEA. But the loss to HEA from Dr. LoCascio's leaving HEA was not limited to the direct patient-shift costs imposed by Dr. LoCascio's competition; it also involved such elements as the foreseeable but difficult to calculate losses in overall HEA billings due to the abrupt loss of a physician in the practice — not to mention the lost income from the anticipated stock purchase. Dr. LoCascio testified that his billings in 4 years at HEA were $2.5 million.

The jury was instructed that if it found that the liquidated damages amount was unreasonably large and therefore punitive, the jury could in the alternative award actual damages. The jury decided, based on all of the evidence, that the liquidated damages were in fact reasonable.

Our review of the evidence leads us to the conclusion that a jury could conclude that these two well-represented professionals had arrived at a reasonable formula for estimating the damages to HEA that would occur if Dr. LoCascio breached his contractual promises, and the result of applying that formula was not grossly disproportionate to

reality. Consequently, we conclude that the circuit court erred in directing a verdict for Dr. LoCascio on the latter two grounds that the court recited.

The final issue that we must address is whether the circuit court erred in granting Dr. LoCascio a new trial on the grounds that Dr. LoCascio was unable to fully and fairly defend against Dr. Roisman's claims. We have reviewed the record and conclude that Dr. LoCascio was given a fair opportunity to put on all of the evidence and argument that he wished in both defense and offense. Dr. LoCascio took the stand twice to explain his position. At the end of the trial, Dr. LoCascio was given the right to call or re-call additional witnesses for either defensive or offensive purposes; and he was also offered a recess to consider strategy. Dr. LoCascio has not proffered any specific evidence that he says could have made a difference in the outcome of the jury's deliberations.

The jury had the law, the evidence, and the argument with which to assess the competing claims of the parties. Dr. LoCascio took the position that he did not, could not, and need not adhere to the contract's provisions because of alleged ethical, medical, and legal wrongdoing by Dr. Roisman. The jury simply did not accept that position.

"The verdict of a jury will be held sacred by this Court, unless there is a plain preponderance of credible evidence against it, evincing a miscarriage of justice from some cause, such as prejudice, bias, undue influence, misconduct, oversight, or some misconception of the facts or law." Syllabus Point 1, *Young v. West Virginia & P.R. Co.*, 44 W.Va. 218, 28 S.E. 932 (1897).

Appendix A

III.

Finally, we recognize and appreciate the careful, deliberate, and thorough consideration that the circuit court gave to the instant case. While our legal conclusions differ from those reached by the circuit court, this difference does not diminish our respect for the conscientiousness and professionalism of the court and counsel who tried the instant case.

For the foregoing reasons, we reverse the order of the circuit court directing a verdict for Dr. LoCascio on Dr. Roisman's claims against Dr. LoCascio, and granting Dr. LoCascio a new trial in the alternative. We remand the case to the circuit court for entry of judgment on the verdict returned by the jury.

Reversed and Remanded.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA ENTERING JUDGMENT AND GRANTING NEW TRIAL DATED MAY 2, 2000

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

CIVIL ACTION NO.: 94-C-496
JUDGE DAVID M. PANCAKE

HUNTINGTON EYE ASSOCIATES, INC.,

Plaintiff,

v.

JOSEPH A. LOCASCIO, III, M.D.,

Defendant.

ORDER ENTERING JUDGMENT FOR DR. JOSEPH A. LOCASCIO, III, M.D. PURSUANT TO RULE 50(b) AND GRANTING DR. LOCASCIO A NEW TRIAL

On this day came Joseph A. LoCascio, III, M.D., defendant and, Huntington Eye Associates, Inc., plaintiff, pursuant to Dr. LoCascio's "Motion Pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure for Entry of Judgment as a Matter of Law or in the Alternative for New Trial". The Court having reviewed the briefs filed by the parties, having heard oral argument and otherwise being sufficiently advised hereby, pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, enters judgment for

Joseph A. LoCascio, III, M.D. as a matter of law as to all claims and causes of action asserted by Huntington Eye Associates, Inc. against him. The Court further finds that even if the Court would not have entered judgment for Joseph A. LoCascio, III, M.D. that it would have, in the alternative, granted him a new trial.

The Court's opinion is based upon the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1. Prior to February 6, 1990 Huntington Eye Associates, Inc. (hereinafter sometimes referred to as "HEA") and Joseph A. LoCascio, III, M.D. (hereinafter sometimes referred to as "LoCascio") entered into discussions relative to LoCascio becoming an employee of HEA.

2. It was a fundamental understanding between LoCascio and HEA that HEA was to be a multi-disciplinary practice i.e. practicing many different areas of ophthalmology medicine.

3. LoCascio and the sole shareholder of HEA, Dr. Tully Roisman, had substantially the same type practice.

4. It was contemplated by HEA and LoCascio that a retina specialist and a glaucoma specialist would join the ophthalmic practice of HEA.

5. HEA provided certain earnings projections to LoCascio and made specific representations that those projections were reasonable.

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6. On February 6, 1990 HEA and LoCascio entered into an "Employment and Stock Agreement" (hereinafter sometimes referred to as the "Agreement").

7. The Agreement called for an initial term of one year (terminating February 5, 1991) and a renewal for three (3) additional years (terminating February 5, 1994).

8. The Agreement was in fact renewed and by its own terms terminated February 5, 1994.

9. Paragraph 10, 11 and 12 of the Agreement read, in pertinent parts, as follows:

> 10. *Sale of Stock*: Upon and subject to the terms and conditions set forth in this Agreement, HEA agrees to sell, or to cause its sole shareholder, Dr. Tully S. Roisman, to sell, and Physician agrees to purchase, free and clear of all liens, pledges or encumbrances of every kind whatsoever, to Physician, such number of the shares of the common capital stock of HEA, so that, upon such sale, Physician shall be the owner of a fractional share of the then issued and outstanding capital stock of HEA, which fraction shall be calculated as follows: the numerator of the fraction shall be one (1), and the denominator of the fraction shall be a number which is the sum of (a) the number of the then existing stockholders of HEA, plus (b) the number of physician-employees (including Physician) who at such time shall have binding agreements to purchase stock of HEA, which

agreements were executed prior to September 1, 1990. Physicians who shall execute such stock purchase agreements on or after September 1, 1990 shall purchase such shares proportionately from all of the stockholders of HEA. The intent hereof is that all such physicians shall ultimately own equal shares of the stock of HEA. Such fraction shall hereinafter be referred to as Physician's "Fractional Share.". . .

11. *Closing*: The sale and purchase provided in this Agreement shall be consummated at a closing to be held . . . four (4) years after the commencement date for the initial term hereunder or at such other place, time and date as the parties hereto shall mutually agree upon. The date and event of the sale and purchase are, respectively, hereinafter referred to as the "Closing Date", and the "Closing". On the Closing Date, there shall be delivered to Physician the shares of stock set forth above, accompanied by all requisite State of West Virginia stock transfer stamps or funds for the purchase thereof. *The sale contemplated hereunder shall be concluded only if Physician shall be a full-time employee of HEA at the time of Closing*. . . . (emphasis added by Court)

12. *Consideration for Stock*: The consideration to be paid by Physician for the Fractional Share of the capital stock of HEA being sold and purchased hereunder shall be a sum equal to such Fractional Share of the good will and of the net

value of the assets of HEA, as of the time of Closing, and computed as the sum of the following:

Tangible assets owned by HEA as of the date of this Agreement and on the Closing Date shall be valued at cost less seven percent (7 %) per year from the date hereof until the Closing Date. Provided, however, that in no event shall such tangible assets, still in productive use, be valued at less than thirty-five percent (35%) of the original cost thereof.

Tangible assets acquired by HEA subsequent to the date hereof and owned by HEA on the Closing Date shall be valued at cost less seven percent (7 %) per year from the date of acquisition until the Closing Date. Provided, however, that in no event shall such tangible assets, still in productive use, be valued at less than thirty-five percent (35%) of the original cost thereof.

The accounts receivable of HEA shall be valued at face amount, less a commercially reasonable reserve for bad debts.

Cash on hand and in banks or other savings or investment institutions.

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The fair market value of all other assets of HEA.

Less any indebtedness of HEA.

Good will is agreed to be a sum equal to twenty-five percent (25%) of the total collections received by HEA during the twelve (12) full calendar months immediately preceding the Closing Date.

For the purposes of calculating such purchase price, medical records and consumable supplies shall have no value and shall not be considered.

All the foregoing calculations shall be made as of the last day of the calendar month immediately prior to the closing date. Payment of the purchase price so calculated shall be paid by Physician, in cash, upon Closing hereunder, unless said parties shall agree otherwise in writing.

10. Paragraph 19 of the Agreement read, in pertinent part, as follows:

19. *Restrictions*: HEA will provide Physician with complete access to its books, records, patient lists and data, as well as its professional methods, procedures, contracts, knowledge and experience, to an extent which HEA would not provide

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Physician except in contemplation of this Agreement. Physician has represented to HEA and its officers that he does not intend or desire to remain or practice medicine within the area professionally served by HEA, if in fact he does not remain employed by HEA and if he does not purchase such equity stock interest in HEA, as herein contemplated. Therefore, in consideration of the covenants and agreements on the part of HEA as set forth in this Agreement, *both for employment and for the sale of said stock*, Physician does covenant and agree with HEA in the event that his employment by HEA shall be terminated for any reason whatsoever, then and in such event Physician agrees that he will not engage in the practice of ophthalmic medicine, *for a period of at least two (2) years after leaving the employment of HEA within a radius of fifty (50) miles of the city limits of Huntington, West Virginia or of any HEA branch office*. Physician acknowledges that in the event he breaches such agreement herein made on his part, then HEA will suffer damages by virtue of the premises and such breach, and the parties do hereby agree that the amount of such damages in such event would be a sum equal to two (2) years' total (base, incentive and profit-sharing) compensation at the rate provided for Physician in this Agreement, and in effect at the time of such breach. Similar restrictions will be applied to all physicians, stockholder and non-stockholder, of HEA. (underlining added by Court)

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11. Subsequent to LoCascio beginning his employment with HEA, HEA hired two (2) additional physician optometrists, Dr. Gary Schraut (a retina specialist) and Dr. Michael Krasnow (a glaucoma specialist).

12. Prior to LoCascio announcing his intention to terminate his employment with HEA Dr. Krasnow and Dr. Schraut had announced their intent to terminate their employment with HEA.

13. No action of LoCascio caused either Schraut or Krasnow to leave the employ of HEA.

14. HEA had its main office in Huntington, West Virginia. HEA had branch offices in Portsmouth, Ohio; Teays Valley, West Virginia; Ironton, Ohio and Williamson, West Virginia.

The Teays Valley, West Virginia; Ironton, Ohio and Williamson, West Virginia offices were opened after LoCascio joined HEA. At the time LoCascio entered into the Agreement he did not know or could he have known that these offices would be opened, which had the effect of vastly enlarging the "non-competition" area.

15. The Portsmouth, Ohio office of HEA was closed shortly after LoCascio left HEA and HEA opened an Ashland, Kentucky office.

16. HEA did not have any investment in the brick and mortar, people or equipment at the Teays Valley, West Virginia; Ironton, Ohio and Williamson, West Virginia branch

offices. HEA employees and physicians saw patients at the Teays Valley, Ironton and Williamson sites infrequently, one or two times a month. These branch offices were in fact owned by unrelated optometrists who allowed HEA to use the offices.

17. LoCascio was a fully trained and board certified ophthalmologist upon his employment with HEA. HEA was not required to undertake any training of LoCascio in order for LoCascio to begin his employment.

18. During LoCascio's four year employment with HEA, LoCascio's billings and collections amounted to approximately 2.5 million dollars. Dr. LoCascio during this same period of time received salary of One million dollars.

19. HEA did not buy any equipment or expend any significant sum as a result of LoCascio becoming employed by HEA.

20. For reasons upon which the parties are in dispute, but which are not germane to the Court's opinion and reasoning, LoCascio terminated his relationship with HEA at the end of the four (4) years provided in the Agreement.

CONCLUSIONS OF LAW

1. The West Virginia Supreme Court of Appeals in *Reddy v. Community Health Foundation of Man*, 298 S.E.2d 906 (W.Va. 1982) set forth the inquiry as to the enforceability of a covenant out to compete in an employment relationship. The Court stated (at p. 911):

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> "A restraint is reasonable only if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."

2. The West Virginia Supreme Court has also found in *Weaver v. Ritchie*, 478 S.E.2d 363, 367 (W.Va. 1996) that:

> A restriction imposed upon a person following the termination of a period of employment imposes a restraint upon a person's freedom to work for himself. Public policy . . . frowns upon [a restraint upon a person's freedom to work for himself].

3. The covenant in the present case prohibiting competition within a "radius of fifty (50) miles of the city limits of Huntington, West Virginia or of any HEA branch office" does not pass muster under the elements set forth in *Reddy*.

4. As set forth by the West Virginia Supreme Court in *O'Hommell Co. v. Fink*, 177 S.E. 619 (W.Va. 1934) and *Reddy*, supra, and as is the majority rule among other jurisdictions in the United States (43 A.L.R. 2d 94) the inclusion in the restricted territory areas in which has no or limited business interest renders the covenant unenforceable, unreasonable and not necessary for the protection of the employer.

5. The Court takes notice that the federal government has set forth specific guidelines in determining the maximum rational area for the delivery of vision care services. 42 CFR Appendix D to Part 5 states:

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1. Rational Areas for the Delivery of Vision Care Services.

(a) The following areas will be considered rational areas for delivery of vision care services:

(i) A county, or a group of contiguous counties whose population centers are within 40 minutes travel time of each other;

(ii) A portion of a county (or an area made up of portions of more than one county) whose population, because of topography, market or transportation patterns, or other factors, has limited access to contiguous area resources, as measured generally by a travel time of greater than 40 minutes to these resources.

(b) The following distances will be used as guidelines in determining distances corresponding to 40 minutes travel time:

(i) Under normal conditions with primary roads available: 25 miles.

(ii) In mountainous terrain or in areas with only secondary roads available: 20 miles.

(iii) In flat terrain or in areas connected by interstate highways: 30 miles.

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6. The Plaintiff provided evidence at trial that for a three year period (1995, 1996 and 1997) HEA averaged approximately 2,077 patients.

7. The Plaintiff at the Summary Judgment state of the trial did provide some evidence of the location of patients and from that list it is quite obvious to the Court that very few patients seen by HEA (less than 1%) in the three year period resided in a locality which was more than 30 miles from "Huntington or any branch office of HEA". The evidence at trial was at best limited and simply was to the effect that HEA had some patients outside the 50 mile radius and as far away as Pittsburgh, Pennsylvania.

8. The Court further finds that as a conclusion of law that the physician/patient relationship is a personal relationship.

9. A medical practice does not in and of itself have a protectible interest simply in patients. As stated in the American Medical Association's Code of Medical Ethics § 7.03.

> *The patients of a physician who leaves a group practice should be notified that the physician is leaving the group. Patients of the physician should also be notified of the physician's new address and offered the opportunity to have their medical records forwarded to the departing physician at his or her new practice.* It is unethical to withhold such information upon request of a patient. If the responsibility for notifying patients falls to the

> departing physician rather than to the group, the group should not interfere with the discharge of these duties by withholding patient lists or other necessary information. (Emphasis added)

10. The Court, however, is not saying that a medical practice never has an interest in its patients which requires protection. The Court finds that situations, as in the one now before the Court, in which a physician was fully qualified and board certified prior to joining the practice, the practice was not required to purchase additional equipment or undertake any significant capital expenditure and the physician brought in significantly more than he was paid that in such an instance the practice seeking protection cannot simply rely on the general catchall "goodwill of patients" as a sole protectible interests.

11. In *Reddy* the West Virginia Supreme Court did not simply find the "goodwill of patients" to be protectible. The Court remanded the matter to the Circuit Court to conduct a review of whether or not "investment in supporting equipment and staff cannot be made economically if doctors can leave freely once their position with patients is secure."

12. In the present case, HEA did not make any investment in supporting equipment or staff as a result of LoCascio's employment. Furthermore, three branch offices of HEA (Teays Valley; Ironton and Williamson) did not even belong to HEA and more importantly HEA only manned those offices infrequently.

13. By requiring the 50 mile non-competition radius to run from Huntington "or any branch office" of HEA, HEA

effectively converted a 50 mile radius to one covering in some directions at least 120 miles.

14. The Court also notes the dichotomy between protections necessary for eleemosynary institutions publicly funded seeking to provide quality health care in rural areas and for-profit practices seeking salary to maximize profits. The public interest mandates that individuals have access to quality health care. Access to quality health care invites a more comprehensive and far reaching geographical limitation in a non-competition agreement and a lesser protectible interest review. However, in other instances, in which access to quality health care is not protected by enforcement of a far reaching geographical limitation, a Court should review the geographical limitation and protectible interest with a more jaundiced eye. If, as in the case now before the Court, patients would be deprived of reasonable access to the physician of their choice and there is no concomitant societal need for protection of the area encompassed by the non-compete restriction, then the public interest requires an excessively broad non-compete be struck and held for naught. In the present case the public interest weighs heavily in LoCascio's favor. Given the breadth of the non-competition agreement when the "branch offices" were factored into the non-competition area it would have been impractical for patients in the non-compete area to be seen by LoCascio. The Court notes that simply drawing 50 mile circles[1] around Huntington,

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1. The Court notes that the circles would not be a true depiction of the actual "non-competition area" in that the 50 mile radius does not begin until the city limits are reached. Given the size of any given city this greatly increases the scope and breadth of the non-competition area.

West Virginia, Portsmouth, Ohio, Ironton, Ohio, Teays Valley, West Virginia and Williamson, West Virginia would exclude LoCascio from a large part of West Virginia and significant parts of Ohio, Kentucky.

15. The Court further holds that as a matter of law that the "non-competition provision" of the contract must be read together with that provision which required LoCascio to purchase stock in HEA. The Agreement provides in paragraph 10 that "[I]n consideration of the covenants and agreements . . . set forth in this Agreement, *both for employment and for the sale of stock*, Physician does covenant and agree . . . that he will not engage in the practice of ophthalmic medicine, within a radius of fifty (50) miles of the city limits of Huntington, West Virginia or of any HEA branch office."

16. The Court in striking the non-competition clause also strikes that provision of the Contract requiring LoCascio to purchase stock in HEA.

17. The Court further finds that as a matter of law that neither HEA or LoCascio ever intended LoCascio to purchase stock if he was not employed at HEA. The Agreement specifically states that "the sale contemplated hereunder shall be concluded only if Physician shall be a full-time employee of HEA at the time of Closing". (Par. 11)

18. Additionally, the Court holds that the parties entered into the Agreement with the express understanding that HEA would be a multi-disciplinary practice.

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19. Prior to LoCascio departing the employ of HEA, Drs. Schraut and Krasnow had advised HEA of their intent not to join HEA.

20. The provision of the contract requiring LoCascio to purchase an interest in HEA became unenforceable — the intention of the parties being the controlling factor.

21. The Agreement further called for the purchase price to be calculated upon the belief that the value of goodwill was 25% of "the total collections received by HEA during the twelve (12) full calendar months." The preceding twelve (12) months there were four (4) full-time physicians. The Agreement was silent and thus ambiguous as to what effect this would have on the purchase price, i.e. was the purchase price .25 times the collected sum of all HEA physicians or only the physicians who were continuing with HEA.

22. Strict enforcement of the contract would also require LoCascio to be entitled to ⅓ or ¼ of the stock and have to pay the same purchase price in either instance.

23. The Court further holds that the 200% liquidated damages provision of the Agreement was a penalty and was unenforceable.

24. As stated by the Supreme Court in *Wheeling Clinic v. Van Pelt*, 453 S.E.2d 603, 608 (W.Va. 1994):

> The question of whether the provision calling for 100% of a departing partners' annual earnings is unenforceable liquidated damage clause or an

invalid penalty was a question of law ascertainable by the circuit court . . . .

25. Plaintiff's own expert testified that the actual damages sustained by Plaintiff were less than 100% of LoCascio's salary. The Court finds that the 200% provision was grossly disproportional to any actual damages.

26. The Court further holds that in that there was no enforceable non-competition covenant in the Agreement that there can be no cause of action against LoCascio for "intentional interference" with business relations.

27. The Court further holds that there was no intentional act by a party outside business relationship or expectancy or that any interference caused any harm to HEA, essential elements of a claim for tortious interference. See *Ternan v. Charleston Area Medical Center*, 506 S.E.2d 518 (W. Va. 1998).

NEW TRIAL

1. The Court now takes up Defendant Motion for New Trial. Although the Court finds this matter to be moot given its previous rulings in this Order it hereby finds that LoCascio was deprived of his right to put on a complete and adequate defense.

2. This Court at the close of Plaintiff's evidence advised the parties that it was going to grant Defendant request for judgment as a matter of law. Defendant then was directed to put on its counterclaim. Only after Defendant put on its

counterclaim evidence and released its witnesses including its out-of-state expert did the Plaintiff request that the Court allow Plaintiff's claims to be submitted to the jury. A request the Court granted and now finds to have been in error.

3. This Court's actions resulted in Defendant being deprived of his constitutional right to adequately and completely defend himself.

4. Wherefore, in the alternative, in view of the foregoing, the Court is of the opinion to and does hereby grant a new trial to the Defendant as to any claim, if any, the Plaintiff has against the Defendant.

s/ David M. Pancake
Judge – David M. Pancake

APPENDIX C — ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA REFUSING PETITION FOR REHEARING DATED AND ENTERED OCTOBER 24, 2001

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of October 2001, the following order was made and entered:

No. 28889

Huntington Eye Associates, Inc.,

Plaintiff Below, Appellant

vs.

Joseph A. LoCascio, III, M. D.,

Defendant Below, Appellee

The Court, having maturely considered the petition for rehearing filed on the 1st day of October, 2001, by the appellee, Joseph A. LoCascio, III, M. D., by Jackson & Kelly, Daniel L. Stickler, Albert F. Sebok and James Eric Whytsell, his attorneys, doth hereby refuse said petition for rehearing.

A True Copy

Attest: s/ [illegible]
Clerk, Supreme Court of Appeals